

Exhibit 17

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-01789 (Substantively Consolidated SIPA)

4 - - - - - x

5 In the Matter of:

6

7 BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

8 Debtor.

9 - - - - - x

10 Adv. Case No. 10-03635-cgm

11 - - - - - x

12 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

13 Plaintiffs,

14 v.

15 UNION BANCAIRE PRIVEE, UBP SA et al.,

16 Defendants.

17 - - - - - x

18 Adv. Case No. 10-03636-cgm

19 - - - - - x

20 FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

21 Plaintiffs,

22 v.

23 UNION BANCAIRE PRIVEE, USP SA et al.,

24 Defendants.

25 - - - - - x

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1 Adv. Case No. 11-02540-cgm

2 - - - - - x

3 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

4 MADOFF TRUST,

5 Plaintiffs,

6 v.

7 LION GLOBAL INVESTORS LIMITED,

8 Defendant.

9 - - - - - x

10 Adv. Case No. 12-01194-CGM

11 - - - - - x

12 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

13 MADOFF TRUST,

14 Plaintiffs,

15 v.

16 KOOKMIN BANK,

17 Defendant.

18 - - - - - x

19

20 United States Bankruptcy Court

21 355 Main Street

22 Poughkeepsie, NY 12601

23

24 October 19, 2022

25 10:00 AM

Page 3

1 **B E F O R E :**
2 **HON CECELIA G. MORRIS**
3 **U.S. BANKRUPTCY JUDGE**
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5 **ECRO: UNKNOWN**
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1 HEARING re 10-03635-cgm Doc# 858 Notice of Adjournment of
2 Hearing RE: Pre Trial Conference; hearing not
3 held and adjourned to 10/19/2022 at 09:00 AM at
4 Videoconference (ZoomGov) (CGM)

5

6 HEARING re 10-03635-cgm Doc# 944 Notice of Adjournment of
7 Hearing RE: Hearing to consider the Letter Requesting a Pre-
8 Motion Discovery Conference Filed by David Elsberg on behalf
9 of Fairfield Sentry Limited (In Liquidation), Fairfield
10 Sigma Limited (In Liquidation), Kenneth Krys, solely in his
11 capacity as Foreign Representative and Liquidator thereof,
12 Greig Mitchell, solely in his capacity as Foreign
13 Representative and Liquidator thereof (related
14 document(s) 938); hearing held and adjourned to 10/19/2022 at
15 10:00 AM at Videoconference (ZoomGov) (CGM) .

16

17 HEARING re 10-03635-cgm Doc# 945 Notice of Adjournment of
18 Hearing RE: Hearing to consider the Letter Requesting a Pre-
19 Motion Discovery Conference Filed by Jeff E. Butler on
20 behalf of Dexia Banque International a Luxembourg (related
21 document(s) 940); hearing held and adjourned to 10/19/2022 at
22 10:00 AM at Videoconference (ZoomGov) (CGM) .

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1 HEARING re 10-03636-cgm Doc# 985 Notice of Adjournment of
2 Hearing re: Pre-Trial Conference; Hearing not held and
3 adjourned to 10/19/2022 at 10:00 AM at Videoconference
4 (ZoomGov) (CGM) (DuBois, Linda).

5

6 HEARING re 10-03636-cgm Doc# 1025 Notice of Adjournment of
7 Hearing RE: Hearing to consider the Letter Requesting a Pre-
8 Motion Discovery Conference Filed by David Elsberg on behalf
9 of Fairfield Lambda Limited (In Liquidation), Fairfield
10 Sentry Limited (In Liquidation), Fairfield Sigma Limited (In
11 Liquidation), Greig Mitchell, solely in his capacity as
12 Foreign Representative and Liquidator thereof, Kenneth Krys,
13 solely in his capacity as Foreign Representative and
14 Liquidator thereof. (related document(s)1004); hearing held
15 and adjourned to 10:00 AM at Videoconference (ZoomGov) (CGM)

16

17 HEARING re 10-03636-cgm Doc# 1026 Notice of Adjournment of
18 Hearing RE: Hearing to consider the Letter Requesting a Pre-
19 Motion Discovery Conference Filed by Jeff E. Butler on
20 behalf of Dexia Banque International a Luxembourg. (related
21 document(s)1006 ; hearing held and adjourned to 10/19/2022
22 at 10:00 AM at Videoconference (ZoomGov) (CGM).

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1 HEARING re 11-02540-cgm Doc# 108 Motion to Dismiss Adversary
2 Proceeding / Motion and Notice of Motion to Dismiss the LGI
3 Complaint (Barak, Ehud)

4

5 HEARING re 11-02540-cgm Doc# 119 Opposition /Trustee's
6 Memorandum of Law in Opposition to Defendant's Motion to
7 Dismiss the Complaint (related document(s)108) filed by
8 Robertson D. Beckerlegge on behalf of Irving H. Picard,
9 Trustee for the Liquidation of Bernard L. Madoff Investment
10 Securities LLC, and Bernard L. Madoff.

11

12 HEARING re 11-02540-cgm Doc# 122 Reply to Motion / Defendant
13 Lion Global Investors Limiteds Reply in Further Support of
14 its Motion to Dismiss the Complaint (related document(s)108)
15 filed by Ehud Barak on behalf of Lion Global Investors
16 Limited.

17

18 HEARING re 12-01194-cgm Doc# 77 Motion to Dismiss Case filed
19 by Richard A. Cirillo on behalf of Kookmin Bank with hearing
20 to be held on 6/15/2022 at 10:00 AM at Videoconference
21 (ZoomGov) (CGM) Responses due by 5/6/2022,. (Attachments: #
22 1 Exhibit Complaint # 2 Exhibit Complaint Ex. A # 3 Exhibit
23 Exhibit to Complaint 1/5 # 4 Exhibit Exhibit to Complaint
24 2/5 # 5 Exhibit Exhibit to Complaint 3/5 # 6 Exhibit Exhibit
25 to Complaint 4/5 # 7 Exhibit Exhibit to Complaint 5/5 # 8

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1 **Exhibit Ex. C to Complaint)**

2

3 **HEARING re 12-01194-cgm Doc# 92 Notice of Adjournment of**
4 **Hearing RE: Opposition /Trustees Memorandum of Law in**
5 **Opposition to Defendant Kookmin Banks Motion to Dismiss**
6 **(related document(s) 77) filed by Eric R Fish on behalf of**
7 **Irving H. Picard, Trustee for the Liquidation of Bernard L.**
8 **Madoff Investment Securities LLC; hearing not held and**
9 **adjourned to 10/19/2022 at 10:00 AM at Videoconference**
10 **(ZoomGov) (CGM) .**

11

12 **HEARING re 12-01194-cgm Doc# 93 Reply to Motion filed by**
13 **Richard A. Cirillo on behalf of Kookmin Bank.**

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25 **Transcribed by: Sonya Ledanski Hyde**

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1 A P P E A R A N C E S :

2

3 CIRILLO LAW OFFICE

4 Attorneys for Kookmin Bank

5 246 East 33rd Street

6 New York, NY 10016

7

8 BY: RICHARD A. CIRILLO

9

10 Selendy Gay Elsberg PLLC

11 Attorneys for Fairfield and Various Fairfield Entities

12 1290 Avenue of the Americas, 17th Floor

13 New York, NY 10104

14

15 CLIFFORD CHANCE US LLP

16 Attorneys for Banque Internationale a Luxembourg

17 31 West 52nd Street

18 New York, NY 10019

19

20 BY: JEFF E. BUTLER

21

22

23

24

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1 PROSKAUER ROSE LLP

2 Attorneys for Lion Global Investors Limited

3 11 Times Square

4 New York, NY 10036

5

6 BY: RUSSELL T. GORKIN

7

8 BAKER HOSTETLER LLP

9 Attorneys for the Trustee

10 45 Rockefeller Plaza

11 New York, NY 10111

12

13 BY: ROBERTSON D. BECKERLEGGE

14 ERIC R. FISH

15

16 ALSO PRESENT TELEPHONICALLY:

17 CARTER BRYCE BENSON

18 DAVID W. PARHAM

19 KAYLA HARAN

20 DOUGLAS A. KELLNER

21 HEATHER LAMBERG

22 MARK MAKAR

23 DANIEL SHAMAH

24 MARK G. HANCHET

25 CHRISTOPHER J. HOUPP

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1 ARI MACKINNON
2 LISA M. SCHWEITZER
3 DAVID EISBERG
4 DAVID S. FLUGMAN
5 STEVEN FROOT
6 CAITLYN HOLUTA
7 THOMAS S. KESSLER
8 JOSHUA S. MARGOLIN
9 AMY NEMETZ
10 JENNA C. SMITH
11 JOHN F. ZULACK
12 JOHN S. CRAIG
13 BIANA LIN
14 LAUREN J. PINCUS
15 JOHN F. ZULACK
16 GARY A. WOODFIELD
17 ROBERT J. LACK
18 RANDY LEWIS MARTIN
19 LAURA TAVERAS
20 MARCELLA OLIVER
21 DAVID PARHAM
22 ANDREW VILLACASTIN
23 KEVIN C. KELLY
24 JAIME B. LEGGETT
25 RICARDO SABATER

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1 UDAY GORREPATI
2 ERIC HALPER
3 KAYLA HARAN
4 ANGELA K. HERRING
5 NICHOLAS ICKOVIC
6 PAUL KANELLOPOULOS
7 RONALD KROCK
8 NORDEA FOLKE BERNDOTTES
9 MEREDITH GEORGE
10 KENNETH KRYS
11 GREIG MITCHELL
12 NOWELL BAMBERGER
13 JONATHAN CROSS
14 CHRISTINE DEVITO
15 JUSTIN P. DUDA
16 ROXANNE EASTES
17 ROSA J. EVERGREEN
18 ABIGAIL GOTTER-NUGENT
19 KEVIN A. GUERKE
20 ERIC HALPER
21 JOSEPH M. KAY
22 KEVIN C. KELLY
23 CHRISTOPHER M. LAMBE
24 ADAM M. LEVY
25 MATTHEW B. LUNN

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1 **MARK MCKEEFREY**
2 **MICHAEL S. NEIBURG**
3 **HENRY SEIJI NEWMAN**
4 **JEFFREY A. ROSENTHAL**
5 **NICOLE SERRATORE**
6 **ELLIOT STEVENS**

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1 P R O C E E D I N G S

2 THE COURT: Good morning, everyone. Excuse me.

3 It's the fall allergy season. The first one I have on today
4 is the two adversary proceedings in Fairfield. Adversary
5 Proceeding 10-03635, Fairfield Sentry v. Union Bancaire
6 Privee, UBP SA et al, and 10-03636, Fairfield Sentry Limited
7 et al v. Adler and Co., Privatbank AG, et al.

8 State your name and affiliation.

9 MR. ELSBERG: This is David Elsberg from Selendy
10 Gay Elsberg representing the liquidators, Your Honor. And
11 with me is my associate, Amy Nemetz.

12 MS. NEMETZ: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. BUTLER: Good morning, Your Honor. I'm not
15 sure which of the various defendants is at issue here, but I
16 am one of them. It's Jeff Butler from Clifford Chance
17 representing one of the defendants --

18 THE COURT: Which one?

19 MR. BUTLER: Banque International Luxembourg.

20 THE COURT: Banque International Luxembourg. That
21 one is Ms. Elsberg? That one is which one.

22 MR. ELSBERG: Your Honor, Amy Nemetz is going to
23 be handling this conference.

24 THE COURT: Just let me know which one. That's
25 all I need to know.

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1 MR. ELSBERG: It should just be BIL.

2 THE COURT: Okay. Give me a second. Which
3 adversary proceeding? Give me the number.

4 MS. NEMETZ: Your Honor, it's 10-3635 and 10-3636.

5 THE COURT: Okay. I already said that.

6 MS. NEMETZ: Yes.

7 THE COURT: And Mr. Butler -- and he said he
8 didn't know which one he was dealing with. So which one is
9 he dealing with?

10 MR. BUTLER: I'm sorry, Your Honor. There are
11 numerous defendants in that case, and I'm not familiar if
12 there might be other disputes arising from the same two
13 matters. I am here to speak about the proposed 30(b)(6)
14 deposition that the liquidators are seeking on the subject
15 of document retention. We discussed this at the last
16 conference, and Your Honor put in --

17 THE COURT: So you're on both of them. That's
18 correct. And it's for -- and you're representing
19 Luxembourg. Okay. I did not understand when you said you
20 didn't know what you were dealing with.

21 MR. BUTLER: My apologies, Your Honor.

22 THE COURT: If you don't, I don't.

23 MR. BUTLER: With such a large group, I never know
24 exactly what matter is up, Your Honor. And so I apologize.

25 THE COURT: Okay. This is the only matter we have

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1 today. The only matter we really have is basically -- and
2 you wrote a letter asking for a discovery conference,
3 ordered a meet and greet. And you're in jurisdictional
4 discovery. This is jurisdictional discovery. So -- and you
5 -- and from what I've been reported is that you don't have
6 searchable email boxes.

7 So we are here today because, Ms. Nemetz, you are
8 the one that needs a Rule 30-whatever number, someone from
9 the company to testify or to -- deposition, correct?

10 MS. NEMETZ: That's correct, Your Honor. We also
11 asked that BIL produce a very limited scope of documents
12 relevant to the spoliation issues in our Rule 30(b) (6)
13 notice. BIL has also asked this Court to grant them a
14 protective order against the deposition, which we believe
15 should be denied.

16 And then finally, the liquidators would like leave
17 to move under Rule 37 for remedies related to the spoliation
18 issue once the deposition is completed.

19 THE COURT: Okay. So that's your request today.
20 It's a very simple, straightforward request. And, Mr.
21 Butler, your response to basically --

22 MR. BUTLER: Our position is essentially since the
23 last conference, we've had two in-person meet and confers
24 with Ms. Nemetz and her colleagues that have focused on what
25 documents are available in the bank that may be relevant to

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1 the issue of personal jurisdiction.

2 And to be honest, we have identified some
3 additional documents. Those discussions are ongoing. In my
4 mind, they're not complete yet. We certainly haven't
5 refused to produce any of the pockets of documents that
6 we've identified that may be relevant. So this is really
7 not an issue about document production as it relates to
8 records available within the bank concerning the one
9 redemption that is at issue in the case. I think that we've
10 had very civil and productive conversations about that, and
11 we have been very open, we believe, about what documents
12 exist that may be relevant to the issue of personal
13 jurisdiction.

14 This 30(b) (6) request -- and our motion for
15 protective order is just the flip side of that. We're
16 trying to not have that 30(b) (6) deposition at this time.
17 We think it's really a different issue. It's an attempt to
18 build a spoliation case against the bank, arguing that we
19 did not do things back in 2008 or 2010 that we should have
20 done. In my mind, that is more of a merits discovery issue.
21 It may be appropriate to do this type of deposition at some
22 point in the case. But during this phase of limited
23 personal jurisdiction discovery, it really is a bridge too
24 far, especially when we are being as cooperative as we can,
25 we think, with producing the documents that continue to

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1 exist within the bank relating to the issue of personal
2 jurisdiction.

3 And that's not an insignificant number of
4 documents, Your Honor. It doesn't include everything that

5 the liquidator would like to have, but it does include hard
6 copies of emails, which is the way the bank kept emails back
7 at that time. I was a different era, Your Honor.

8 Everything was done by facsimile. And to keep records
9 within the bank, they just printed out copies of emails and
10 put them in a file, which has been retained and has been
11 produced to the liquidators.

12 There are various other documents that are
13 available like the account statements relating to this
14 redemption, the agreements with the particular customer on
15 whose behalf the bank made this redemption. All of those
16 are available for production. And, frankly, once we produce
17 those, we will have completed not only personal jurisdiction
18 discovery, but pretty much all the discovery in terms of
19 documents that the bank will be able to provide in this
20 case.

21 So under those circumstances, we do not think a
22 Rule 30(b)(6) deposition concerning what was done after this
23 case was filed to preserve and collect documents is
24 necessary or appropriate, and it should await a decision
25 from this Court on whether there is personal jurisdiction

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1 before that kind of discovery proceeds.

2 THE COURT: Okay. Ms. Nemetz, what discovery have
3 you already received?

4 MS. NEMETZ: So we have received a limited hard
5 copy packet of emails that, as Mr. Butler stated, were
6 printed off at various points in time and preserved. And
7 we've also received additional --

8 THE COURT: I'm going to stop you right there.

9 MS. NEMETZ: Yes.

10 THE COURT: Limited is an editorial word. So how
11 can you say it's limited? Tell me what you really mean.

12 MS. NEMETZ: So there are a few dozen emails that
13 were produced in hard copy by BIL. The liquidators have
14 subsequently located separate email communications that were
15 produced by third parties that show relevant individuals at
16 BIL not only engaging in additional emails that BIL did not
17 produce, but they are key emails with individuals at FGG
18 trying to get their contact information or they involve
19 relevant individuals at the bank receiving, offering
20 memoranda, or other diligence materials.

21 And BIL, based on what we know to date, which I
22 can explain to Your Honor if you would like, didn't even try
23 to preserve that information. So we know that what they've
24 given us is only a subset of what once existed.

25 MR. BUTLER: Your Honor, if I may just respond to

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1 those two emails. I received copies of those emails for the
2 first time last night. They have not been provided
3 previously, despite having a number of in-person meet and
4 confers on this topic.

5 I respectfully disagree based on my examination of
6 them. One of the emails has nothing to do with the
7 redemption at issue in this case. The other one I believe,
8 at least large portions of it, was part of the file that we
9 produced in hard copy form. So it's consistent with what I
10 understand from interviews and discussions with my clients
11 and the people involved that the practice was to print off
12 key emails -- this was back in 2007, Your Honor, so many,
13 many years ago -- and keep them in the back office file
14 which has been provided to the liquidators.

15 THE COURT: Okay. This is all still seemingly
16 personal jurisdiction to me, and it seems that you're
17 minimizing when you have BCC copies from other entities.
18 Okay. All right. What else?

19 MS. NEMETZ: So, Your Honor, based on the
20 discussions that we have had with Mr. Butler to date, we do
21 know some information about BIL's practices. And those
22 practices indicate that significant electronic evidence was
23 not preserved by the bank. So we know that BIL didn't even
24 issue a litigation hold related to the Fairfield funds until
25 November 2010. We know that BIL employees, including the

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1 ones who did actually receive the litigation hold, were
2 permitted to freely delete information from the bank's
3 systems even after the hold was issued. We know that BIL
4 took no steps at an institutional level to save down
5 relevant information --

6 THE COURT: Okay. Now we're talking about
7 personal jurisdiction. And you're saying that these emails
8 go to personal jurisdiction.

9 MS. NEMETZ: Absolutely, Your Honor.

10 THE COURT: Okay.

11 MS. NEMETZ: There were -- we know that there was
12 evidence relevant to personal jurisdiction. We've provided
13 Mr. Butler with examples of what we have been able to cobble
14 together from third parties that would demonstrate the
15 context between BIL and the United States. So the
16 information existed and there's no question that BIL failed
17 to keep it.

18 MR. BUTLER: Your Honor, respectfully, that's pure
19 speculation.

20 THE COURT: If you would wait, Mr. Butler. Let me
21 ask her a question.

22 And this is whether they directed their intentions
23 to New York on their -- on what they were doing?

24 MS. NEMETZ: Yes, Your Honor.

25 THE COURT: With respect to United States. Yeah.

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1 MS. NEMETZ: Right. So the two emails that we
2 found, one of them shows one of the six employees at the
3 bank that BIL has identified to be relevant to this
4 redemption in this case. She sends an email to Citco asking
5 for the contact information of two individuals at FGG,
6 Fairfield Greenwich Group, which was the manager of the
7 funds. She gets that contact --

8 THE COURT: And you got this through Citco. How
9 did you get this information?

10 MS. NEMETZ: Correct. It was produced in another
11 litigation involving Citco, and I believe that we received
12 that document production.

13 THE COURT: Okay. Okay. Now then, Mr. Butler,
14 what do you have to say?

15 MR. BUTLER: Well, with respect to that specific
16 email, which I saw for the first time this morning, it's a
17 2006 email. So it does not relate to the 2007 redemption at
18 issue in this case. And it's important to understand I
19 guess a bit of background.

20 There's one redemption that's at issue in this
21 case. The Fairfield liquidators also sued my client, Dexia
22 BIL, in another case for redemptions that they made not
23 through Citco, but directly in their own name. And there
24 were a number of transactions that fit into that category,
25 but that separate case has been dismissed with prejudice.

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1 And that dismissal has been affirmed now at least once on
2 appeal. So those redemptions are not at issue in this case.
3 And we have from the beginning of discovery in this case
4 drawn a line between documents that relate to the particular
5 redemption in this case and redemptions that were made in --
6 the other redemptions --

7 THE COURT: I think that's for me to decide.

8 MR. BUTLER: -- as part of that other case that
9 has been dismissed.

10 THE COURT: I think that's for me to decide, Mr.
11 Butler, about the --

12 MR. BUTLER: Well, Your Honor, that may be the
13 case. But I think it would require a motion from the
14 liquidators, which we haven't even discussed --

15 THE COURT: Okay, then we can file a motion.
16 That's exactly where I am today.

17 MR. BUTLER: Okay.

18 THE COURT: I'm going to permit the liquidators to
19 file a 37(a) motion for an order compelling discovery or
20 disclosure. So then you can look at it.

21 MS. NEMETZ: Your Honor, so to clarify, I'm not
22 sure that Mr. Butler can state as a factual matter --

23 THE COURT: I can't, either. You filed your
24 motion.

25 MS. NEMETZ: Right. So this is why we need a

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1 30(b) (6) deposition, Your Honor. Because we need someone to
2 tell us what was kept, why, whether BIL acted reasonably
3 under the circumstances.

4 THE COURT: I agree.

5 MS. NEMETZ: I think Mr. Butler has confirmed that
6 there is nothing left in his client's possession for us to
7 compel discovery of. He doesn't have anything else.

8 MR. BUTLER: I would say we've produced everything
9 that exists, but I agree --

10 THE COURT: I hear you, Mr. Butler. But you don't
11 have somebody from the company telling them that. So I
12 don't need you testifying to this. I need you -- that's --
13 I need a 30(b) (6) motion and I need a 37(a) motion. Let's
14 get this moving along. Run the motions. I'll answer when
15 you get there. You lay it out for Mr. Butler.

16 MS. NEMETZ: Okay. So, Your Honor, to clarify --

17 THE COURT: I'll give you both --

18 MS. NEMETZ: I'm sorry?

19 THE COURT: I'll give you both -- I'll let you
20 file both motions. Let's move it.

21 MS. NEMETZ: Okay. Thank you very much, y h.

22 THE COURT: (indiscernible) isn't really a motion.
23 Okay.

24 MR. BUTLER: I understand, Your Honor. So we'll -
25 - they'll file the motions. We'll get an opportunity to

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1 respond, and we'll go from there.

2 THE COURT: Not on the 30(b)(6). I don't think
3 you have to have a motion on 30(b)(6). You just have --

4 MR. BUTLER: Okay. Then we'll proceed with the
5 30(b)(6) deposition and the liquidator can decide what to do
6 on a Rule 37 motion.

7 THE COURT: Exactly.

8 MR. BUTLER: Understood, Your Honor. Crystal
9 clear.

10 MS. NEMETZ: And, Your Honor, we also asked that
11 the Court impose a deadline by which the document production
12 and deposition take place just so that we can keep this
13 moving. I think you proposed October 31st.

14 THE COURT: You know I like to move it. So how
15 quickly?

16 MR. BUTLER: Your Honor, the challenge with the
17 30(b)(6) is I have to prepare a witness in Luxembourg.
18 They're quite unfamiliar with this procedure. So I would
19 request --

20 THE COURT: Well, you've had a lot of time to talk
21 to them. You've been asking them for these -- it's been
22 months.

23 MR. BUTLER: True.

24 THE COURT: So it seems to me preparing a witness
25 isn't going to take that long. You just need the CIO or

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1 somebody at a higher rank that can tell you what went on and
2 can put their hands on stuff.

3 MR. BUTLER: And that person, y h, after more than
4 ten years, is going to have to do a certain amount of their
5 own investigation in order to do a proper job --

6 THE COURT: It sounds to me like you haven't asked
7 them before then if that's what you're saying, Mr. Butler.
8 And I don't think you want to say that to me.

9 MR. BUTLER: I did not mean to give that
10 impression. There's been a lot of work done by me --

11 THE COURT: You did give that impression. You did
12 give that impression.

13 MR. BUTLER: I am sorry, Your Honor, if I did give
14 that impression.

15 THE COURT: Okay.

16 MR. BUTLER: Your Honor, I respectfully request
17 that we do this within a month, but that --

18 THE COURT: Okay. Come back and talk to me --
19 come back and tell me what you all are doing on December the
20 145th.

21 MR. BUTLER: Thank you, Your Honor.

22 THE COURT: And I think you should have had the
23 depositions before -- or try to have them before November
24 the 15th. Let's move this along.

25 MR. BUTLER: Thank you, Your Honor. We'll get

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1 that done.

2 THE COURT: Thank you. Anything else on
3 Fairfield?

4 MS. NEMETZ: Your Honor, I just want to clarify
5 that --

6 THE COURT: Sure. We're going to move fast.
7 We're going to move fast.

8 MS. NEMETZ: Thank you. So Mr. Butler and BIL are
9 going to produce the documents requested in our 30(b)(6)
10 notice, which go to the issues that we need to discuss and
11 the eventual motion we will file.

12 THE COURT: In 21 days they're going to produce
13 them. (indiscernible) tell you who you are going to depose,
14 and it may take a little more than 21 days for that to
15 happen, but you will know who you are going to depose and
16 who you are going to be talking to.

17 MS. NEMETZ: Thank you, Your Honor.

18 THE COURT: Mr. Butler has now reassured me that
19 he has been talking to the company and he knows what's going
20 on in the company. So I've been reassured of that on the
21 record.

22 MS. NEMETZ: And so we'll do the deposition by
23 November 15th.

24 THE COURT: I don't know that you'll get the
25 deposition by November 15th. You'll get the information and

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1 you'll get who is going to be at the deposition, and you
2 will be able to schedule it.

3 MS. NEMETZ: Okay. I appreciate that, Your Honor.

4 THE COURT: So I would love to have it done by
5 November the 15th, but that's pushing for all of you to be
6 in Luxembourg and back from Luxembourg and have the
7 information you need in order to do a deposition. But you
8 all are going to report back to me on December the 14th just
9 to give me an update on what's going on.

10 MR. BUTLER: Thank you, Your Honor.

11 MS. NEMETZ: Thank you, Your Honor.

12 MR. ELSBERG: Thank you, Your Honor.

13 THE COURT: And that's a long time. Thank you.
14 Very good. Now then I am into -- thank you, everyone, on
15 Fairfield.

16 Now we're into 11-02540, Picard v. Lion Global
17 Investors Limited. State your name and affiliation.

18 MR. GORKIN: Good morning, Your Honor. Russell
19 Gorkin from Proskauer Rose on behalf of the Defendant, Lion
20 Global Investors Limited, which I will refer to today during
21 my presentation as LGI as we did in our papers.

22 MR. BECKERLEGGE: Good morning, Your Honor. Rob
23 Beckerlegge from Baker and Hostetler for the Trustee.

24 THE COURT: Very good. This is your motion to
25 dismiss, Mr. Gorkin.

1 MR. GORKIN: Yes. Thank you, Your Honor.

2 As you know, last week we wrote to the Court along
3 with Mr. Beckerlegge to let you know that the parties do not
4 intend to spend time today arguing any grounds for dismissal
5 that are not unique to LGI and which the Court has already
6 addressed in the context of other proceedings where the
7 issues are essentially identical.

8 But LGI was not willing to enter into a
9 stipulation to forego oral argument altogether, as several
10 other defendants have done, because to our knowledge no
11 other defendant in any other adversary proceeding faces a
12 situation remotely like the one LGI does here.

13 And the situation I am referring to is that the
14 Trustee's filed a complaint asserting certain jurisdictional
15 allegations to LGI but has now admitted that none of the
16 essential allegations needed to find jurisdiction over LGI
17 are actually true. None of them.

18 And so I want to walk through each of those
19 disavowed allegations in a moment and we'll address the
20 significance of what the Trustee is now attempting to do in
21 his opposition brief.

22 But before going there, I want to just briefly
23 touch on another issue that's lurking in the background
24 because it's important. And that issue is the fact that the
25 Trustee filed his complaint more than 11 years ago,

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1 something the adversary proceeding number provides a stark
2 reminder of each time an ECF notification is filed. And
3 what that means is that LGI has been subject to these
4 proceedings for the past 11 years which have gone up and
5 down the federal court system while the Trustee has known
6 all along that the allegations he asserted and which were
7 necessary for this Court or any American court to exert
8 jurisdiction over LGI were false.

9 Now, fortunately, LGI has been able to somewhat
10 manage the time and resources devoted to this matter because
11 other defendants over whom personal jurisdiction this Court
12 has found to exist and who did subscribe to and buy shares
13 in Fairfield Sentry have mostly taken the lead on addressing
14 issues common to all defendants when your predecessors
15 decided to bifurcate common issues like comity and extra-
16 territoriality and address those first before turning to
17 Defendant's specific arguments.

18 But this case was remanded for Defendant's
19 specific proceedings on October 27th, 2020, almost exactly
20 two years ago. And since then, the Trustee has not once
21 sought to amend his complaint to remedy what he has long
22 known are false allegations. And when LGI filed its motion
23 to dismiss back in April, six months ago, explicitly drawing
24 the Trustee's attention to the false allegations asserted in
25 his complaint, he still did not seek to amend his complaint

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1 as he could have done under Federal Rule of Procedure
2 15(a)(1)(B), made applicable by Federal Rule of Bankruptcy
3 Procedure 7015. Instead, the Trustee filed an opposition
4 brief agreeing with LGI that the allegations he had asserted
5 against it were false, but arguing that the falsity of those
6 allegations apparently doesn't matter because he has a whole
7 other set of allegations based on the conduct of other
8 entities, none of which are so much as even mentioned
9 anywhere in the complaint.

10 Now, as we explained in our reply brief, the
11 Trustee is wrong legally. And I'll tell you why in a
12 moment. But even if this Court were to disagree with my
13 argument as to why his new contentions are still legally
14 insufficient, as a matter of procedure, how can this case
15 possibly move forward unless and until the Trustee makes a
16 motion to amend his complaint.

17 LGI obviously must answer allegations set forth in
18 a complaint, not a brief. But the Trustee has admitted all
19 of his critical allegations are false. And if this case
20 ever were to move into the discovery phase, how could either
21 party determine whether document requests satisfy relevance
22 requirements if the operative allegations the trustee
23 intends to rely upon have not yet even been set out in a
24 short and plain statement as the federal rules require?

25 So I think all of that is relevant background when

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1 thinking about how this motion needs to be adjudicated,
2 which I'll come back to at the end of my presentation. But
3 right now what I want to do is turn to what's alleged in the
4 complaint and what the Trustee has disavowed. Because the
5 starting point for a motion to dismiss a complaint is of
6 course the complaint itself.

7 Now, all of the Trustee's jurisdictional
8 allegations are set forth in Paragraph 7 of this complaint.
9 And the first allegation he levies there is that LGI
10 "knowingly directed funds to be invested with New York-based
11 BLMIS through Fairfield Sentry." But the Trustee has
12 disavowed that allegation and admitted that LGI did not in
13 fact direct any funds to be invested with New York-based
14 BLMIS. And we see that right off the bat on the very first
15 page of the Trustee's opposition brief where he writes,
16 StrautsLion24x06 Asset Management, not LGI, "Straits Lion
17 Asset Management is the entity that made the investment in
18 Sentry." And we see that again at Page 11 of his opposition
19 brief where he writes, and I quote, "Straits Lion's
20 intentional investment with BLMIS in New York through a
21 known BLMIS feeder fund establishes personal jurisdiction."

22 But as you know, Straits Lion is not the defendant
23 here, LGI is. And that's the entity over whom the Trustee
24 needed to plead a *prima facie* case of jurisdiction.

25 Now, the second allegation the Trustee asserted in

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1 Paragraph 7 of his complaint is that, "By directing its
2 investment through Fairfield Greenwich Group, Defendant,
3 Lion Global, accepted the rights, benefits, and privileges
4 of conducting business and/or transactions in the United
5 States."

6 But again, as just shown, the Trustee has
7 disavowed this allegation, too. And he does so even more
8 specifically at Page 16 of his opposition brief when he
9 writes, and I quote, "When Straights Lion first invested in
10 Sentry, it was aware that FGG conducted key operations from
11 its New York office."

12 Next, the Trustee alleges in Paragraph 7, "Upon
13 information and belief, Defendant Lion Global entered into a
14 subscription agreement with Fairfield Sentry providing for
15 New York jurisdiction." This too the Trustee has admitted
16 is false. At Pages 6 and 8 he writes, "Straits Lion
17 subscribed \$50 million into Sentry in March and April of
18 2005."

19 Fourth, the Trustee alleges in Paragraph 7 of his
20 complaint that LGI "Sent a copy of the subscription
21 agreement to FGG's New York Office and wired funds through a
22 bank in New York." But LGI did not send a subscription
23 agreement to FGG's New York office or wire funds through a
24 bank in New York, as the Trustee admits at Page 8 of his
25 opposition brief where he writes, "The Trustee is in

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1 possession of records establishing that Straits Lion made
2 subscription payments into Sentry." And that, "Straits Lion
3 placed a total of \$50 million into Sentry in multiple
4 subscription agreements between March and April of 2005."

5 If the Trustee alleged that LGI "Communicated by
6 email and telephone with Fairfield Sentry account
7 representatives located in Fairfield Greenwich Group's New
8 York City office and traveled to Fairfield Greenwich Group's
9 New York City office to meet with Fairfield Sentry account
10 representatives."

11 But at Page 16 of his brief, he admits that LGI
12 did no such thing, writing, "Straits Lion, through its
13 personnel, traveled to New York in July of 2004 to meet with
14 FGG at FGG's New York headquarters. Straits Lion
15 participated in 12 days' worth of meetings with FGG with
16 multiple Straits Lion executives in attendance. FGG and
17 Straits Lions personnel spent a significant amount of time
18 together."

19 And it continues on Page 17, writing, "Mr. Tong
20 Foo Cheong of Straits Lion communicated with Mr. Blum of FGG
21 in New York." And that there were "Additional
22 communications between Straits Lion and FGG personnel."

23 So in other words, according to the Trustee,
24 Straits Lion, a separate legal entity, not LGI, the
25 Defendant in this action, established contacts with New

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1 York.

2 Now, the Trustee attempts to reconcile his
3 admissions that LGI has not itself made any contacts with
4 the United States or New York by grouping it into the "Lion
5 Family" of entities. And you see that right on the first
6 page of his brief. He writes, "This Lion family of entities
7 and successors, including Defendant, purposely availed
8 themselves of New York law by engaging with the Fairfield
9 Greenwich Group in New York to not only invest in Sentry,
10 but also to establish a joint venture to sell FGG products,
11 including Sentry, in Asia."

12 But even if this statement had been asserted as an
13 allegation in his complaint, which it was not, it would
14 still not establish jurisdiction over LGI because group
15 pleading is not permitted and jurisdiction must be
16 established over each individual defendant. And the Trustee
17 has disclaimed any argument that any of the other Lion
18 Family's member's contacts with New York, which are all he
19 talks about, can be attributed to LGI. The Trustee makes
20 this explicit at Page 14 of his opposition brief, writing,
21 "He is not alleging jurisdiction exists over LGI due to
22 alter ego liability, imputation, or happenstance."

23 So the hodgepodge of contentions that the Trustee
24 now throw out in his opposition brief about other Lion
25 Family members and whether employees of Straits Lion also

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1 might have later worked at LGI at some point and all the
2 rest are all legally irrelevant according to the Trustee
3 himself.

4 In fact, in case there was any doubt that the
5 Trustee has not established a prima facie case of
6 jurisdiction over LGI based on his complaint, he leaves no
7 doubt when he writes, and I quote, "Here, Straits Lion --"
8 not LGI, "Straits Lion knowingly and purposefully directed
9 activity into New York."

10 Now, the only allegation asserted in Paragraph 7
11 that the Trustee arguably still stands by is that LGI
12 "Knowingly received transfers from BLMIS by withdrawing
13 money from Fairfield Sentry."

14 Now, as an initial matter, that's just factually
15 wrong. James Peng, LGI's COO, submitted a sworn declaration
16 and testified in Paragraph 8 therein that LGI "was not a
17 party, either as principal or as agent for others, to the
18 transactions that are the subject of the complaint." That,
19 "LGI has never been a member or shareholder in Sentry and
20 that LGI neither was, nor is a party to the Sentry
21 subscription or redemptions agreements and never received,
22 either as principal or agent, the alleged transfers
23 Plaintiff seeks to recover in this adversary proceeding."

24 But second, and even more importantly, even in
25 some other alternate universe where that allegation actually

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1 was true, that is the only jurisdictional allegation the
2 Trustee has left, and it is a legally insufficient basis for
3 asserting jurisdiction over LGI.

4 Now, the United States Supreme Court made that
5 crystal clear in the Helicopteros case. That's 466 U.S.
6 408, 416, which we cite in our opening brief, where it held
7 that a foreign defendant's receipt of funds was "of
8 negligible significance" and did not suffice to establish
9 personal jurisdiction.

10 Now, I understand in a totality of circumstances,
11 that might be relevant. But as I just explained, there are
12 no other allegations here. And standing alone, it's of
13 negligible significance.

14 Now, I haven't read every decision in the related
15 proceedings that this Court has issued so far, I'll admit.
16 But I am unaware of this Court finding personal jurisdiction
17 based only on the mere receipt of funds and the Trustee has
18 not cited any decision of this Court or any others where
19 that would suffice, either.

20 Now, at Page 16 of his opposition brief, he does
21 suggest that this Court's opinion in Picard v. BNP Paribas
22 provides that withdrawal of funds from Sentry alone would be
23 a sufficient basis to establish jurisdiction over a
24 defendant. That's not a genuine or faithful reading of that
25 case. And that's apparent from the face of it. There, all

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1 of the Defendant's main offices and employees in New York
2 and conducted business with regard to the transaction at
3 issue through those New York-based employees and offices.

4 That's not the case. LGI has never had an office
5 or other place of business or employee located in the United
6 States, as Mr. Peng testified at Paragraph 6 of his
7 declaration, and the Trustee does not contend otherwise.

8 Unlike all of the other cases this Court has
9 adjudicated and found personal jurisdiction to exist thus
10 far, there is simply no allegation sufficient to exert
11 jurisdiction over the Defendant here.

12 For example, in the published Multi-Strategy
13 decision, that's 0881789 ECF Number 21729 at Pages 6 to 8,
14 this Court found jurisdiction existed because the Trustee
15 devoted over five pages to the Defendant's specific contacts
16 with New York. Here, we have one paragraph and the Trustee
17 has expressly disavowed the crucial jurisdictional
18 allegations contained therein.

19 Likewise, in Bank Hapoalim, Adversary Proceeding
20 12-01216 at *7, this Court wrote, "In response to the motion
21 to dismiss, the Trustee provided the subscription agreements
22 entered into by the Defendants, "And on that basis concluded
23 altogether the subscription agreements combined the
24 Trustee's allegations are sufficient to constitute a prima
25 facie showing of jurisdiction."

1 Here, the Trustee admits LGI did not enter into
2 any subscription agreements. Instead, he contends that
3 Straits Lion did. A unlike in Hapoalim, he has not even
4 submitted any of those subscription agreements, either.

5 And one last example is Bank Syz. That's
6 Adversary Proceeding 11-2149. In that case, the Trustee
7 alleged that the named defendant maintained its own account
8 directly at BLMIS and even filed a customer claim in the
9 SIPA proceeding, voluntarily and purposefully availing
10 itself of New York's and the United States' laws with
11 respect to BLMIS funds. None of that has happened here, and
12 the Trustee does not contend otherwise. So we know that the
13 complaint does not establish jurisdiction over LGI.

14 Now, in connection with his opposition brief, the
15 trustee filed a declaration through Mr. Beckerlegge,
16 attaching some exhibits. And LGI recognizes that a
17 Plaintiff may submit affidavits and supporting materials
18 containing an averment of facts that, if credited, would
19 suffice to establish jurisdiction over the Defendant.

20 So what are the relevant averment of facts that
21 the Trustee has asserted through those materials to
22 establish jurisdiction over the Defendant, LGI? He submits
23 a printout of a website page stating that Straits Lion
24 merged in 2008 with another entity, OCBC Asset Management,
25 to form what became LGI and argues that as a result, there

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1 is a successor liability basis to assert jurisdiction over
2 LGI.

3 Now, first, the Trustee's contention that LGI was
4 created in 2008 as a result of the merger between Straits
5 Lion and another entity is demonstrably untrue. And that is
6 not only proven by the certificates of incorporation and
7 name changes attached as Exhibits A and B to Mr. Peng's
8 declaration, which establishes that LGI was incorporated in
9 1986, but from the very exhibit the Trustee cites to,
10 Exhibit 17 to Mr. Beckerlegge's declaration, which states in
11 the very first sentence that LGI was "established in
12 Singapore in 1986."

13 So all of the affidavits and supporting materials
14 before the Court show that LGI was a separate, independent
15 entity that was operating and doing its own thing in 2005
16 while Straits Lion, which the Trustee acknowledges was
17 formed in 1996, was allegedly doing all of the other things
18 the Trustee writes about now in his brief. And again, the
19 Trustee has affirmatively and explicitly stated he is not
20 arguing jurisdiction exists under an alter ego or imputation
21 theory.

22 But even if we were to assume for the sake of
23 argument that the Trustee's contention that those two
24 entities merged to form LGI was true, which it's not, it
25 doesn't even matter for present purposes because the Trustee

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1 has failed to make a prima facie showing that that fact
2 provides this Court with a legal basis to establish
3 jurisdiction over LGI. And that is because the
4 determination as to whether Straits Lion's alleged contacts
5 with the forum can be attributed to LGI under a successor
6 liability theory is a question governed by Singaporean law.
7 And the Trustee has not put any Singaporean legal expert
8 before this Court from which it can make a determination as
9 to the significance of the fact the Trustee has now
10 asserted. That is not only established by the Energy
11 Intelligence Group Incorporated v. Cowen case cited at Page
12 10 of LGI's reply brief, but by the Trustee's own legal
13 authority.

14 Indeed, the only case the Trustee cites in support
15 of its successor jurisdiction argument is In re Motors
16 Liquidation Company, 565 B.R. 275 from this Court in 2017.
17 And that's Page 22 of his opposition. And that case also
18 shows that whether jurisdiction may be asserted based on a
19 predecessor's contacts and whether they may be imputed to a
20 successor corporation depends entirely on foreign law.

21 Indeed, the court there made a preliminary finding
22 that Austrian law provided a basis for it to conclude that
23 the Austrian defendant could be haled into court based on
24 its predecessor's jurisdictional contacts and therefore felt
25 comfortable moving the case forward. And that was

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1 particularly true because the defendant there, the Austrian
2 defendant there did not move to dismiss on successor
3 liability grounds --

4 THE COURT: Do you have some Singapore law on
5 this, Mr. Gorkin? Are you -- isn't this a Singapore --
6 isn't this a Singapore --

7 MR. GORKIN: Yes, I'm -- correct.

8 THE COURT: So tell me Singaporean. Don't tell me
9 Austrian. Tell me Singapore.

10 MR. GORKIN: Absolutely, Your Honor. And --

11 THE COURT: Before we argue that, argue the
12 jurisdiction in which this is supposedly held. So, okay.

13 MR. GORKIN: Exactly. And so the point, Your
14 Honor, is that Mr. Beckerlegge and the Trustee has alleged
15 that LGI is a successor corporation. Even if that fact is
16 true, needs to go one step further to show the legal
17 significance of that fact to this Court. And the only way
18 to do that is through Singaporean law. And he hasn't done
19 that.

20 THE COURT: And you haven't brought it up, either.
21 Okay. Keep going.

22 MR. GORKIN: And that's a fair point. But I want
23 to address that next.

24 And so what the In re Motors case shows us is two
25 things. First, that the Trustee had to submit Singaporean

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1 law to enable the Court to at least make a preliminary
2 finding that Singaporean law would support this Court's
3 exercise of jurisdiction over LGI based on successor
4 liability theory just as the plaintiff in *In re Motors*
5 needed to submit Austrian law to enable the court in that
6 case to make such a finding. It's the trustee's burden.
7 The Trustee did not do that here, and so he failed to carry
8 his burden.

9 But second, the *In re Motors* case demonstrates why
10 Plaintiffs are required to actually set forth the facts and
11 bases for the liabilities they are claiming in a complaint
12 and not an opposition brief. Because the plaintiff in *In re*
13 *Motors* followed this foundational procedural rule applicable
14 to all plaintiffs, the defendant was afforded full and fair
15 notice of the grounds from which the Plaintiff was asserting
16 to hold it liable, namely successor liability.

17 Now, the Austrian defendant ultimately decided not
18 to move to dismiss based on those grounds, presumably
19 because of what Austrian law provided. But here, the
20 Trustee has not pleaded successor liability, meaning LGI did
21 not have an opportunity to move to dismiss on those 12(b) (6)
22 grounds. And remarkably, the Trustee asserted in his
23 opposition brief that "LGI did not argue in its motion that
24 it was not a successor-in-interest to Straits Lion."

25 But as we explained at Page 10 of our reply, of

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1 course we did not make that argument. The Trustee had not
2 made any such allegations. Straits Lion was not even
3 mentioned once in the complaint.

4 So where does all of this leave us? Well, for the
5 reasons discussed, the Trustee has failed to allege in his
6 complaint a prima facie case of jurisdiction over LGI. And
7 now he has also failed to aver facts that are sufficient to
8 carry his burden to show that there is a prima facie case of
9 jurisdiction over LGI.

10 Now, the Trustee has asked for jurisdictional
11 discovery, but that's not appropriate here. He has
12 disavowed all of the facts necessary for jurisdiction that
13 he initially asserted in his complaint. And even if we were
14 to pretend his merger of facts were correct, he has not
15 established a prima facie case under the law. So there is
16 no disputed fact that if proven would show that jurisdiction
17 exists.

18 And so at the outset, as I said, if anything is to
19 happen here, the first thing must be that the Trustee seek
20 leave to file an amended complaint. The Trustee is
21 obligated to set forth a short and plain statement alleging
22 facts in a formal pleading, not a brief, that he contends
23 subjects LGI to liability. He has not done that.

24 And as I said earlier, if this action were to move
25 forward, how could LGI even answer a complaint when the

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1 Trustee has admitted that all of its critical allegations,
2 such as that LGI entered into a subscription agreement, he
3 has admitted those are false. LGI cannot respond to a
4 brief.

5 Coming back though to the fact that this
6 proceeding was filed 11 years ago. We respectfully submit
7 that moving forward in this manner under these circumstances
8 would not be proper and the complaint should be dismissed
9 with prejudice.

10 The Trustee has had in his possession custody or
11 control all of the documents he has now belatedly attached
12 to Mr. Beckerlegge's declaration years later. And how do we
13 know this? In Paragraph 40 of his complaint, the Trustee
14 discusses the settlement he entered into with Fairfield
15 Sentry. And so that settlement agreement is incorporated
16 into it by reference. LGI attached that agreement as
17 Exhibit 6 to Mr. (indiscernible) declaration, which was
18 filed in support of LGI's motion to dismiss. And pursuant
19 to that agreement, the Trustee has had access to all of
20 Sentry's books and records as of June 2011, two months
21 before this action was even filed, and has maintained access
22 ever since.

23 So what does that mean? That means the Trustee
24 could have and should have sought to amend his complaint
25 sometime over the past 11 years. There is no reason why it

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1 could not have done so. LGI has been hauled into this court
2 and other American courts in these proceedings in violation
3 of the Constitution for 11 years and counting and has
4 already filed its motion to dismiss, a memorandum of law, a
5 reply memorandum of law. And we are appearing here at this
6 argument based on the allegations the Trustee stood by up
7 until the eleventh hour when he had completely disavowed
8 them and pulled out a whole alternative set of allegations.

9 It's not equitable or reasonable under these
10 circumstances where the Trustee has sat on his hands and
11 these documents and allegations all of this time and permit
12 him a redo. Thank you.

13 THE COURT: Thank you. Mr. Beckerlegge?

14 MR. BECKERLEGGE: Good morning, Your Honor. Thank
15 you. Rob Beckerlegge from Baker and Hostetler for the
16 Trustee.

17 I want to try to focus this issue -- focus this
18 argument as much as I possibly can, and I want to tick off a
19 few of the things that Mr. Gorkin just mentioned,
20 specifically about all of the documents.

21 The Trustee, despite what Mr. Gorkin has said, has
22 never had and probably never will have all of the relevant
23 documents. So the Trustee has not sat on his hands. That
24 is an argument that has been made and failed by numerous
25 other defendants that have come before Lion.

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1 Additionally, I want to take issue with the use of
2 Mr. Gorkin's vernacular both today and in his brief. He
3 repeatedly says that the Trustee has disavowed allegations
4 or that what we allege we now claim is false or that we
5 admit certain things.

6 I don't believe any of those things to be true or
7 accurate, and I do not believe any of those things were said
8 in our opposition brief. And so I do take issue that that
9 is their stance, that the Trustee has admitted or disavowed
10 anything. The Trustee stands by what he has said and what
11 he has written.

12 I do think that we can focus the issue as much as
13 possible by looking at some of the documents that were
14 submitted attached to my declaration in opposition to their
15 motion. Perhaps the most important exhibit, the most
16 telling exhibit, is Exhibit 5 to my declaration. That is a
17 Citco document. That is not the Trustee's document, that is
18 not Fairfield's document. That is a document from Sentry's
19 administrator reflecting that Lion Global received the
20 redemptions from Sentry in July of 2005.

21 And more specifically if we look at some of the
22 other exhibits attached to my declaration, in Exhibit 1, it
23 acknowledges that Lion Global was formed in 2005. More
24 specifically, we can look at Mr. (indiscernible) email in
25 Exhibit 14 where he acknowledges that \$50 million

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1 subscription. And his bio, which is attached as Exhibit 6,
2 reflects that he was employed by Lion Global Investors from
3 2001 through 2009. So all of these documents support that
4 Lion Global received the redemptions and is the property
5 party in 2005.

6 And so with those documents alone, we believe we
7 have named the proper party.

8 What Mr. Gorkin seems to be arguing is that -- is
9 not so much a personal jurisdiction issue, but more of
10 whether we've named the proper party. The information
11 available to the Trustee indicates such that it was the
12 proper party. Excuse me, that Lion Global was the proper
13 party.

14 In terms of the evolution of the Lion entities,
15 Your Honor, as we understand it -- you've heard a number of
16 references from Mr. Gorkin today to Straits Lion Asset
17 Management. As we understand it, Your Honor, Straits Lion
18 Asset Management became Lion Capital and subsequently was
19 renamed Lion Global. So while I do not know Mr. Gorkin's
20 position on Singaporean law, based on our -- based on the
21 documents available to the Trustee, that is what we were
22 going on.

23 And also Exhibits aside, I want to draw your
24 attention to two additional things. What the argument
25 really boils down to is are there unresolved questions of

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1 fact. And there absolutely are unresolved questions of
2 fact.

3 Now, as you heard Mr. Gorkin say -- I believe he
4 quoted his own briefing -- that Lion Global "Never received
5 as principal or agent the alleged transfers." I don't know
6 exactly what "as principal or agent" means, but it sounds
7 like very carefully-chosen lawyerese to try to avoid
8 liability. And more specifically, it flies directly in the
9 face of Exhibit 5, reflecting the Citco documents which
10 reflect that the redemptions were paid to Lion Global.

11 And also I want to draw your attention, Your
12 Honor, to Page 4 of their reply. They seem to get into the
13 world of hypotheticals at that point and imply that Lion
14 Global may have been a conduit and it may have received
15 transfers on behalf of other entities. That sounds very
16 much like the mere conduit affirmative defense, which is
17 inappropriately raised on a motion to dismiss, is fact-
18 intensive, and certainly leaves open a number of factual
19 questions.

20 Again, I don't know what the phrase "might have
21 received transfers on behalf of other entities" means
22 exactly or how Defendants mean it. But it certainly sounds
23 like a factual issue to be explored.

24 So given the allegations that we are not -- that
25 the Trustee does not walk away from, given the allegations

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1 that the Trustee does not disavow or otherwise now say is
2 false, coupled with the exhibits attached to my declaration,
3 which support a finding of personal jurisdiction, it's the
4 Trustee's position that personal jurisdiction overlying
5 global is reasonable.

6 As for the Defendant's arguments, again, it seems
7 more a question of fact and less a fact of personal
8 jurisdiction. And there are simply too many open questions
9 to be resolved at this time.

10 With that, Your Honor, as indicated in our joint
11 letter, the Trustee rests on the balance of his arguments
12 unless Your Honor has any questions.

13 THE COURT: Mr. Gorkin, do you have anything you
14 wish to add?

15 MR. GORKIN: Yes. Thank you, Your Honor.

16 And so first I'll address where Mr. Beckerlegge
17 began, which is Exhibit 5. That, as Mr. Beckerlegge said,
18 at most shows receipt. Now, again, we disagree with that as
19 a factual matter. But we understand. We are willing to
20 concede for the purposes of this motion when you have to
21 construe everything in favor of the Trustee. Even assuming
22 that's true, receipt is not a sufficient basis to assert
23 personal jurisdiction, as I said.

24 Now, Mr. Beckerlegge referred to other exhibits
25 that he attached to his declaration as well. I addressed

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1 all of those in my presentation. All of those are about
2 Straits Lion's contacts with New York. The Trustee has -- I
3 read from the opposition brief. You'll take a look
4 yourself. There's a record of this proceeding explicitly
5 state he's not claiming alter ego or imputation. And so the
6 sole issue here, the sole basis, what the Trustee is
7 asserting now, belatedly, not in his complaint, never giving
8 us an opportunity to move on 12(b)(6) grounds to dismiss on
9 successor liability, because he pulled this out in his
10 opposition brief, is that there's a family of entities where
11 there's successor liability. But again, it was his burden
12 then to introduce Singaporean law as the plaintiff did in In
13 re Motors where even there the defendant did not even move
14 to dismiss on that basis, yet the court still -- the
15 plaintiff still had to put in Austrian law and the court
16 still had to make that preliminary finding that Austrian law
17 would permit jurisdiction to move the case forward.

18 And so, quite frankly, there is nothing here
19 requiring discovery. Because even assuming all of the
20 things that the Trustee now just says in his opposition
21 brief -- not his complaint -- but even assuming what he says
22 in his opposition brief are true, there is still just
23 nothing here to establish jurisdiction over LGI.

24 THE COURT: Mr. Beckerlegge, let me just ask --
25 well, go ahead. Respond.

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1 MR. BECKERLEGGE: Sure. Your Honor, if I might
2 add one additional thing. I think one thing that has to be
3 kept in mind here is there is an evolution of the
4 relationship between Lion and Fairfield. They had a joint
5 venture together. They formed it in 2004. Now, those
6 contacts that were -- and there was an extensive meeting in
7 New York. They developed an immense understanding of the
8 way Fairfield --

9 THE COURT: Do me a favor, which Lion? You said
10 Lion and you said --

11 MR. BECKERLEGGE: In 2004, based on what we know
12 of, it looks like Straits Lion Asset Management employees
13 came to New York in 2004 for meetings with Fairfield.
14 Ultimately they formed a joint venture with a different name
15 that incorporated both Fairfield and Lion.

16 THE COURT: Which Lion again? Straits Lion or...

17 MR. BECKERLEGGE: Straits Lion. Yes, Your Honor.

18 THE COURT: Or Lion Global? Okay.

19 MR. BECKERLEGGE: Straits Lion.

20 THE COURT: I have a question for you, Mr.
21 Beckerlegge. And that is I just want you to comment on
22 Paragraph 7 of the complaint. And that says, "In this case,
23 the trustee has alleged legal sufficient allegation of
24 jurisdiction simply by stating that the Debtor knowingly
25 directed funds to be invested with New York-based BLMIS

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1 through Fairfield Sentry. This allegation alone is
2 sufficient to establish a prima facie showing of
3 jurisdiction over the Defendant in the pre-discovery stage
4 of litigation.

5 Now, of course you probably took that from some of
6 my opinions. But...

7 MR. BECKERLEGGE: Yes, Your Honor.

8 THE COURT: And that isn't -- and the complaint
9 said, "Directed funds to be invested with the New York-based
10 BLMIS through Fairfield Sentry and knowingly received
11 transfer of customer property from BLMIS through withdrawals
12 from Fairfield Sentry." That's -- explain which the
13 Defendant was in that -- tell me about this.

14 MR. BECKERLEGGE: Your Honor, based on -- in terms
15 of that, we believe that Lion Global received the
16 redemptions because of the Citco document at Exhibit --
17 attached as Exhibit 5. Also because of -- from their own
18 parent company's website, we believe Lion Global existed in
19 2005.

20 THE COURT: Okay. You're sort of mixing me up
21 with the names.

22 MR. BECKERLEGGE: Sure. Let me --

23 THE COURT: Yeah. Try to clarify it for me.

24 MR. BECKERLEGGE: Sure. Your Honor, we don't
25 dispute that Straits Lion Asset Management seems to have

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1 been the one behind the investment in 2005, March and April.
2 And that's reflected in Exhibits 3 and 4. But in terms of
3 the redemptions in July, we believe that those redemptions
4 were received by Lion Global. Based on the documentation, I
5 don't think that's a terribly controversial statement.
6 That's the information the Trustee has to go on. And Mr.
7 Gorkin is saying it was received by Straits Lion Asset
8 Management and the Trustee needs to amend --

9 THE COURT: So how are we getting personal
10 jurisdiction?

11 MR. BECKERLEGGE: Over Lion Global?

12 THE COURT: Yes.

13 MR. BECKERLEGGE: Because Straits Lion Asset
14 Management became Lion Capital, which was subsequently
15 renamed Lion Global. So they are all one and the same.

16 THE COURT: So you're going back to that same
17 argument of successor liability that Mr. Gorkin talks about.

18 MR. BECKERLEGGE: We do, Your Honor. We have no
19 other information to go on. You know, despite Mr. Gorkin
20 and a number of other defendants' representations that the
21 Trustee has everything and this case has been kicking around
22 for over a decade, the reality is the Trustee does not have
23 everything and only has the information that he has.

24 THE COURT: So what you really need is discovery
25 on this is that you're saying to me.

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1 MR. BECKERLEGGGE: We certainly could have
2 discovery on this issue, Your Honor. Discovery would
3 probably then lead to -- I think what Mr. Gorkin was seeking
4 is a motion for amended complaint. So discovery coupled
5 with motion practice. That's a yes, Your Honor.

6 THE COURT: I'm going into chambers. We'll take a
7 recess.

8 MR. BECKERLEGGGE: Thank you, Your Honor.

9 (Recess)

10 THE COURT: We are back. Mr. Gorkin -- I don't
11 see Mr. Beckerlegge. There you are.

12 Anything else you all wish to add?

13 MR. GORKIN: I would just like to add one thing,
14 Judge Morris, which is just to clarify what LGI is
15 requesting here. Because I think it wasn't exactly accurate
16 the way that Mr. Beckerlegge put it, which is first and
17 foremost, we think that the complaint should be dismissed
18 with prejudice. But secondarily, as I said several times,
19 if the Court is not inclined to do that, the Trustee really
20 has to make a motion for leave to amend his complaint and to
21 set out what he is actually alleging in the complaint and
22 that there is no basis to go to discovery before that
23 happens because there's no way to determine the relevance of
24 any discovery.

25 And as I explained during my argument, there is no

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1 fact that, quote, unquote, if proven would then provide the
2 Court a basis for determining that personal jurisdiction
3 exists. We've already said assume, for instance, that what
4 he says in his opposition brief is correct, that LGI is a
5 successor, there's still no legal basis to do it. So what
6 fact is he going to uncover that would then allow this Court
7 to make a conclusion? There's still no law, no basis upon
8 which the Court could assess the significance of that fact.

9 THE COURT: I believe you've already argued that,
10 Mr. Beckerlegge. Do you have anything else you wish to add?

11 MR. BECKERLEGGE: I do. The only thing I would
12 add, Your Honor, is that as far as we know, Straits Lion
13 Asset Management was dissolved. So discovery would be
14 interesting in terms of -- and we'd have to think through
15 what that discovery would look like. But we would
16 anticipate that Lion Global employees would be answering for
17 Straits Lion Asset Management.

18 And also I should add that on that Citco document
19 and Exhibit 5, the addresses are exactly the same. You've
20 got continuity of addresses, you've got continuity of
21 employees. And I know Mr. Gorkin just took himself off of
22 mute, so I know he wants to respond to that. But the
23 reality is we believe Lion Global was the proper party.

24 THE COURT: Only if you want to add something new,
25 Mr. Gorkin.

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1 MR. GORKIN: I'll just talk about Exhibit 5 very
2 briefly, which is that is a 2009 document. The alleged
3 transfers into Fairfield Sentry happened in March and April
4 of 2005 and the redemption happened in July 2005. Now, the
5 Trustee, in Exhibits 3 and 4, has submitted the
6 contemporaneous 2005 documents for going in, but not for
7 coming out. And that's simply implausible or impossible
8 that the 2009 document saying Lion Global Investors is the
9 entity that received it, because we've submitted
10 certificates of incorporation and name changes from the
11 official government agency in Singapore --

12 THE COURT: You're repeating yourself.

13 MR. GORKIN: (indiscernible) until 2008. And this
14 happened in 2005.

15 THE COURT: You repeated yourself. And I've heard
16 you. So the Federal Rules of Civil Procedure 25(b)(1)
17 states in relevant part, "Parties may obtain discovery
18 regarding any matter not privileged which is relevant to the
19 subject matter involved in the pending action. The
20 discovery is not limited to the merits of the case. For
21 example, where issues arise as to jurisdiction or venue.
22 Discovery is available to ascertain the facts bearing on the
23 issue." That's *Oppenheimer Fund v. Sanders*, United States
24 Supreme Court, 437 U.S. 340.

25 And the Second Circuit has stated, "A plaintiff

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1 may obtain discovery in connection with issues related to
2 the court's jurisdiction. A court should take care to give
3 the plaintiff ample opportunity to secure and present
4 evidence relevant to the existence of jurisdiction." Haber
5 v. United States, 823 F.3d 746. "If a plaintiff presents
6 factual allegations that suggest with reasonable
7 particularity the possible existence of the requisite
8 contacts between the parties in the forum state, the
9 plaintiff's right to conduct jurisdictional discovery must
10 be sustained." And there is more in that.

11 From what I've heard today, it's reasonable that
12 we have discovery on this issue. I think I need a
13 scheduling order on what you all are going to do, when and
14 how on discovery. Get together, come back and talk with me
15 on November the 16th with your discovery scheduling order
16 and tell me what you are progressing on. Very good.

17 MR. BECKERLEGGE: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. GORKIN: Thank you, Your Honor.

20 THE COURT: 12-01194, Irving Picard, Trustee,
21 Liquidation of Bernie L. Madoff Investment Securities LLC v.
22 Kookmin Bank. State your name and affiliation.

23 MR. CIRILLO: Good morning, Your Honor. Richard
24 Cirillo of Cirillo Law Office for Kookmin Bank.

25 MR. FISH: Good morning, Your Honor. Eric Fish,

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1 Baker Hostetler, on behalf of the Trustee, Irving Picard.

2 THE COURT: I'm sorry, I accidentally put myself
3 on mute.

4 Mr. Cirillo, it's your motion.

5 MR. CIRILLO: Thank you, Your Honor. I imagine
6 you're wondering why I'm here arguing these points after so
7 many arguments and decisions. The reasons are that -- and
8 I'll call Kookmin Bank KB.

9 KB is a Korean bank. It bought Fairfield shares
10 in 2004 and redeemed them in 2005 and early 2006. The
11 complaint against KB is demonstrably different from those
12 against some of the other defendants in which the plaintiff
13 has made factual allegations that are sufficient under Rule
14 8A as interpreted by the Supreme Court. It is very unfair
15 to hail KB in court --

16 THE COURT: Let me -- I don't want to cut you off,
17 but I want you to focus on something. It seems to me that
18 you have a little bit of a new argument concerning customer
19 property and that there is -- and you even state that
20 there's an obvious alternative explanation. Do you want to
21 give that to me?

22 MR. CIRILLO: Yes, Your Honor. The obvious
23 alternative -- and let me preface that by saying that the
24 courts require that the plaintiff address obvious
25 alternative explanations for a phenomenon that they want to

1 --

2 THE COURT: And let me ask you one other question
3 before you begin. Is that not what you argued in another
4 case in front of me? I just want to be clear.

5 MR. CIRILLO: Yes, it is. But perhaps I didn't --
6 and that was the Korea Exchange Bank case. And I want to
7 deal with the possibility that I wasn't sufficiently clear
8 in my explanation.

9 THE COURT: Actually, you were very clear, Mr.
10 Cirillo.

11 MR. CIRILLO: Well, Your Honor --

12 THE COURT: Just to be clear, you were very clear.

13 MR. CIRILLO: Well, I want to argue two points if
14 Your Honor will hear me. One is the personal jurisdiction
15 point, which I think is different for KB. And the other, I
16 want to underscore a point about the customer property issue
17 that I may not have been as clear on. And I understand that
18 this presumes on Your Honor's time. From my point of view,
19 I need to make the best case for each of my clients. And
20 while I can't overly presume on the Court's time or presume
21 at all on the Court's time, I think that the ability to make
22 the case for each client is part of the process.

23 If Your Honor wants me not to argue the case, then
24 that's a different issue.

25 THE COURT: I never cut somebody off completely.

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1 I just want you to know you've been heard. You were heard
2 before, and you're heard again. I will let you talk. I'm
3 not the Supreme Court. I don't necessarily hit a buzzer,
4 but I will hit a buzzer if you repeat yourself in the same
5 case. So that's...

6 MR. CIRILLO: I understand that. And I appreciate
7 Your Honor's indulgence.

8 On personal jurisdiction, unlike most of the
9 defendants, KB put in a detailed deposition executed on the
10 company's behalf by its officer, Hyung Park. Why did it do
11 so? It wants the Court to understand exactly why the
12 plaintiff is relying on speculative, non-factual
13 allegations. It wants to show that even a minimal Rule 11
14 pre-suit inquiry could have provided -- would have shown
15 that there is no basis for jurisdiction. But mainly to
16 explode the notion that the Plaintiff's allegations are
17 factual as required by Rule 8(a) and not non-factual. And
18 that is specific to this case.

19 The requirement of factual rather than other
20 allegations is exactly what Twombly and Iqbal held and many
21 other cases that say that the Court disregards conclusory,
22 speculative, and legal assertions.

23 The KB complaint insofar as one of the key
24 allegations, if not the key allegation, it uses cookie-
25 cutter language. It is pretty much verbatim tying into

1 Judge Lifland's metaphor in BLI about knowingly tossing a
2 seed and collecting the fruit.

3 In BLI, however, Judge Lifland was very explicit
4 that the defendant have knowledge, be alleged to have
5 knowledge of BLMIS's role in New York in the investment.
6 And to underscore that, at 480 B.R. 517, he says, "BLI
7 invested tens of millions of dollars in Fairfield Sentry,"
8 and here's the key part, "with the specific purpose of
9 having funds invested in BLMIS in New York." Without
10 knowledge, you can't have a specific purpose.

11 He also said, same page, "BLI purposely availed
12 itself of knowing, intending, and contemplating that the
13 substantial majority of funds (indiscernible) in Fairfield
14 Sentry would be transferred to BLMIS in New York."
15 Obviously those key aspects of BLI would not apply and the
16 metaphor would not apply if there was not a sufficient
17 allegation of knowledge. It is that specific factual
18 allegations that are missing from the KB complaint.

19 In the BLI case, the judge pointed to -- Judge
20 Lifland pointed to hard facts that were alleged. And
21 specifically that BLI hired Union Securities to conduct due
22 diligence and that on BLI's behalf, Union Securities learned
23 that Fairfield Sentry, and I quote, "Strategy is executed by
24 BLMIS", that the private placement memorandum provided to
25 Union Securities highlighted BLMIS's central role in

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1 Fairfield Sentry's investment strategy, and that the PPM
2 explicitly stated that Fairfield was required to invest at
3 least 95 percent of its assets in the split strike
4 conversation strategy utilized and controlled by BLMIS in
5 New York.

6 The PPM that Judge Lifland cited was the 2006
7 version. For purposes of this motion, Mr. Fish and I agreed
8 that KB allegedly received and read the 2004 version, which
9 is very different. And we'll see in a moment why that
10 difference is crucial.

11 The Park declaration explains why KB did not know
12 that BLMIS and Madoff were involved. And it gives two
13 reasons. One is it did not need to know those facts or
14 anything about Fairfield Sentry in order to carry out its
15 limited job. The second was that there is nothing in the
16 2004 PPM, which is an exhibit to the Park declaration, or
17 anything else KB allegedly received. Why is that relevant?
18 The Plaintiff argues that knowledge is alleged because it is
19 plausible that KB would have that knowledge as though
20 everybody had that knowledge. He uses these exact words.
21 He says, "The Defendant makes the implausible claim that it
22 did not know that BLMIS or Bernie Madoff had anything to do
23 with Fairfield or its shares." That's Page 13 of the
24 opposition memorandum.

25 This exposes that -- this exposes that the

1 allegation knowledge is not a factual allegation, but
2 conjecture because it's based on the notion that the
3 allegation of knowledge is that non-knowledge is
4 implausible.

5 Common experience, our experience shows that it is
6 not implausible to limit our knowledge to what we need to
7 know to get through our job and our lives. Lack of
8 knowledge is not implausible. For example, we know that
9 bond traders rely heavily or exclusively on bonds ratings
10 and market prices without investigating what the issuer does
11 or with whom it is associated. It's not necessary to know.
12 And I don't want to be cute, but the list of things that
13 people don't know because they don't need to know is
14 somewhat surprising. And these are all from randomized
15 surveys from Pew Research or the National Science Foundation
16 or Fifth Third Bank. These are randomized surveys, show
17 that a quarter of Americans believe that the polio vaccine
18 was --

19 THE COURT: I don't think we can rule on that, and
20 I don't think that's relevant to your argument.

21 MR. CIRILLO: Well, okay. I won't go through
22 them.

23 THE COURT: Stay with relevance.

24 MR. CIRILLO: What is relevant to the argument is
25 that people don't know things that other people assert they

1 know or should know.

2 So what does the complaint actually say? It says
3 KB knowingly directed funds to be invested with New York-
4 based BLMIS through Fairfield Sentry and knowingly received
5 subsequent transfers from BLMIS by withdrawing money from
6 Fairfield Sentry. There are no facts to support that
7 alleged in the complaint, just the word knowingly --

8 THE COURT: Okay, but that is alleged and that's -
9 - we are at alleged stage. We are not at fact stage.
10 That's trial stage.

11 MR. CIRILLO: No, Your Honor. I'm sorry. I have
12 to disagree. That's exactly what the difference between
13 Rule 8(a) and saying something that is conjectural,
14 speculative, and a non-factual allegation. The Supreme
15 Court went through this over and over again in Twombly and
16 Iqbal. And I cite them because they are the Supreme Court.
17 I could cite a hundred other cases that say just saying it's
18 so doesn't make it a factual allegation that shows the
19 Plaintiff is entitled to relief. If that were the case, if
20 it were sufficient just that the plaintiff said it --

21 THE COURT: Mr. Cirillo, that's --

22 MR. CIRILLO: (indiscernible) plaintiff could say
23 anything --

24 THE COURT: I must have misspoke. Because all we
25 care about is that the Trustee alleges that they knew and

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1 that they have facts to support that. Now, then you move on
2 to whatever you want to say. I'll stay out of your --

3 MR. CIRILLO: Well, again, Your Honor, I disagree
4 with that statement of the law.

5 THE COURT: Okay. Okay.

6 MR. CIRILLO: It is not sufficient under the
7 Supreme Court, Second Circuit, Southern District and
8 bankruptcy court law to simply say knowingly. Judge Lifland
9 in BLI had specific facts. In the Dorchester case that Your
10 Honor cites, the Court had a specific fact. And that
11 specific fact -- and it discusses it over and over again --
12 that specific fact was the plaintiff alleged that the
13 defendant had signed a consent to New York jurisdiction.
14 The defendant said, well, that's a fraudulent document. And
15 the court said, well, I can't rule on that on this motion,
16 but it is a factual allegation. And the word "knowing" or
17 "knowingly" is not a factual allegation. And if I can't
18 persuade the Court of that difference between a conclusory,
19 unsupported allegation, then I really should stop. Because
20 the second point is similar. And that is that the only
21 possible factual support for the word knowing or
22 knowledgeable or knowingly is that KB received the 2004 PPM.
23 That PPM is in the record. It doesn't say anything about
24 BLMIS or Madoff being involved in trading or executing the
25 strategy.

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1 To the contrary, it says 17 times that a Bermudian
2 company in Hamilton, Bermuda did that. It doesn't mention
3 Madoff at all. It mentions BLMIS only as a sub-custodian.
4 That has nothing to do with trading or managing the strategy
5 of trading. It says nothing at all about KB having any
6 awareness that BLMIS or Madoff had any involvement. And as
7 the Park declaration -- well, Exhibit 1 is that PPM which
8 Your Honor can refer to. But nothing in it supports -- or
9 the word knowingly. And therefore, there is no knowing and
10 no factual allegation required, as required by the Supreme
11 Court.

12 One of the other things. I've argued to Your
13 Honor and I still adhere to the view that the use of
14 correspondent banks cannot be a basis for jurisdiction
15 alone. That's Amigo Foods, the Court of Appeals in New York
16 said that. They cannot be used as a basis of personal
17 jurisdiction unless the plaintiff alleges factually that the
18 defendant that he seeks jurisdiction over both actively
19 participated in an illegal scheme and that the account was
20 indispensable to carrying it out. That's what Licci and Al
21 Rushaid said in the -- by the New York Court of Appeals,
22 including the Licci decision of the Second Circuit following
23 the New York Court of Appeals answering its certified
24 question.

25 Neither of these elements is sufficient in itself,

1 nor is it sufficient in a totality of circumstances. I
2 could give an example, but I think that would overly presume
3 on the Court's time.

4 The Plaintiff says that that KB executed a
5 subscription agreement and that its execution of the
6 subscription agreement was a purposeful availment of the
7 privileges of New York. Well, that just isn't the case on
8 the document itself, which is Park Exhibit 2 and Fish
9 Exhibits 2 and 3. The document does not say that KB may
10 bring an action against Fairfield in New York. It doesn't
11 say that either Fairfield or KB must bring an action. It is
12 not an exclusive jurisdiction provision. It merely says
13 that if KB sues Fairfield with respect to an issue that is
14 not before the Court -- that is the purchase of shares. But
15 if it does, Fairfield has the right to drag it back into New
16 York court. That's all it says.

17 That is not KB's purposeful availment of New York
18 Jurisdiction. If it's anybody's, it's Fairfield's
19 purposeful jurisdiction of New York. It is not at all clear
20 that Fairfield would use that option to bring it back. And
21 as Your Honor knows, it sued some of the defendants in the
22 BVI rather than in New York, not even itself taking
23 advantage of its own availment of the New York
24 (indiscernible).

25 The Plaintiff says that reading the PPM, one would

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1 know that the split strike conversation strategy involved
2 New York securities, U.S. securities. That isn't a relevant
3 contact. It was not KB that was involved in U.S.
4 securities, it was BVI, a BVI company, Fairfield. It was
5 not relevant any more than it's relevant where car parts
6 were manufactured if you buy the car in Korea. There is no
7 allegation and it is not a fact that Fairfield was a
8 subsidiary or controlled by KB. KB was at most a record
9 shareholder of Fairfield Sentry. Therefore, Walden --
10 Walden v. Fiore, Supreme Court, precludes relying on a third
11 party's actions in connection with a personal jurisdiction
12 decision on a long arm situation such as this. It just is
13 not a relevant contact under the Supreme Court cases. To
14 say otherwise by the Plaintiff is just ipse dixit. It is
15 not a factual allegation.

16 All right, turning to the customer property. And
17 I know I did not persuade you the last time. And as I said,
18 I may have been unclear. But I would like to use this
19 example to illustrate what I'm talking about.

20 Suppose a plaintiff has a bank account. And
21 suppose a defendant makes a payment to a third party. The
22 bank account is what BLMIS has, the payment to the third
23 party is BLMIS's payment to Fairfield.

24 Now the plaintiff sues the defendant. The
25 complaint alleges --

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1 THE COURT: Would you just stick to the facts
2 instead of --

3 MR. CIRILLO: These are the facts. These are the
4 facts --

5 THE COURT: You keep saying suppose.

6 MR. CIRILLO: These are the facts abstracted.

7 Because what the Plaintiff is alleging is that the payment
8 to the third party either came from the Plaintiff's bank
9 account or it came from another source. That's what the
10 Plaintiff in my example said, and that's exactly what the
11 Trustee is saying in the case against KB.

12 These are two equal possibilities. Therefore, one
13 is not more plausible than the other. Neither enjoys an
14 inference of plausibility. The complaint says they are two
15 even-steven possibilities. Why is that the case? As Your
16 Honor has held, this is one big case. All of the adversary
17 proceedings are part of it. As Your Honor knows, the
18 Plaintiff has made judicial admissions in this case in the
19 form of its other complaints in this case where they allege
20 a much greater amount of money being paid out by Fairfield
21 than being paid by BLMIS to Fairfield. That means that
22 either the Defendant, KB here, got its money from BLMIS, or
23 it got its money from another source. And this is --

24 THE COURT: But this is the same argument you had
25 before about -- okay. It's the same argument you --

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1 MR. CIRILLO: Well, yeah. It doesn't make what I
2 said before incorrect. I just want to be sure for KB that I
3 have made my position clear and I've made a record of my
4 position.

5 THE COURT: Okay.

6 MR. CIRILLO: So I would ask Your Honor to read
7 Twombly and Iqbal for a thousand-one-hundred times. I know
8 you've read it many times before. They dismissed the
9 actions before them. They are exactly on point with this
10 argument about KB. And they dismissed the complaints before
11 them, and I asked the Court to dismiss the KB complaint.

12 I rest on my opening and reply brief for the other
13 points that we raised for dismissal. Thank you.

14 THE COURT: Thank you very much. Yes, sir, Mr.
15 Fish.

16 MR. FISH: Good morning, Your Honor. I plan to
17 spend most of my time on the personal jurisdiction issue.
18 But I just want to touch briefly on the customer property
19 issue that Mr. Cirillo was just talking about first. And
20 I'll just say there's nothing about the allegations
21 regarding Kookmin Bank's receipt of customer property in
22 this case that's different from the other cases in which his
23 argument has been rejected. The trustee's allege the
24 relevant pathways in Exhibits B and C to the complaint. In
25 fact, Exhibit C includes more than 30 transfers from

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1 Fairfield Sentry to Kookmin Bank. Nothing more is required
2 at this time. So unless Your Honor has any questions, I
3 will move on to personal jurisdiction.

4 THE COURT: I do not. Thank you.

5 MR. FISH: So the totality of the circumstances
6 shows that personal jurisdiction is more than appropriate
7 here. All of Kookmin Bank's arguments regarding the lack of
8 jurisdiction are rebutted by the Trustee's allegations and
9 arguments in the Trustee's opposition. And Kookmin Bank's
10 arguments have been rejected by this Court in previous
11 subsequent transfer cases before Your Honor.

12 First, the Trustee has properly alleged that
13 Kookmin Bank purposefully availed itself of the privileges
14 of conducting activities in the U.S. and New York
15 specifically. The Trustee alleges that Kookmin Bank
16 invested in Fairfield Sentry to gain access to BLMIS, which
17 is a plausible allegation when taken together with the
18 allegation that 95 percent of Fairfield Sentry's assets were
19 invested in BLMIS. And again, as Mr. Cirillo mentioned,
20 this is a similar allegation that's been accepted by the
21 Court in other cases. And although they have a declaration
22 -- I'll touch on that briefly in a few minutes. But it's
23 undisputed that -- you know, whether they new or not that it
24 was Madoff -- and it seems implausible that they didn't.
25 But whether they knew or not, it's undisputed that Kookmin

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1 Bank used a New York bank account to receive transfers, the
2 very transfers that at issue in this case, and also had one
3 subscription agreement where they used a New York bank
4 account to pay the subscription fees or to pay into
5 Fairfield Sentry.

6 Second, it's not disputed that Kookmin Bank signed
7 a subscription agreement. In fact, they signed three of
8 them agreeing to jurisdiction in New York and the
9 application of New York law. And third, it's not disputed
10 that Kookmin Bank received a private placement memorandum
11 outlining the New York-centric nature of the investment and
12 the funds being custodied with Madoff. In fact, they refer
13 to the same PPM, private placement memorandum, that Mr.
14 Cirillo discussed in the Korea Exchange Bank case. It's the
15 same one that he's bringing forward to the Court here.

16 So these contacts are not random, gratuitous, or
17 attenuated. And the Trustee's allegations are not
18 conclusory. Rather, the Trustee has made a prima facie
19 showing of purposeful availment. And as in other cases,
20 these claims arise out of or relate to Kookmin Bank's
21 conduct in the forum and it's reasonable to confer
22 jurisdiction under the circumstances.

23 And the arguments that Kookmin Bank makes in its
24 motion are the same or similar to the other motions before
25 Your Honor. And there's really no reason to stray from

1 prior opinions -- prior decisions, either factually or
2 legally. And Kookmin Bank's arguments should similarly be
3 rejected.

4 So I want to just touch briefly on this
5 declaration that Kookmin Bank submitted because it rebuts
6 the complaint allegations that the -- that Kookmin Bank
7 purposefully invested in Fairfield Sentry to get to BLMIS.
8 But Kookmin Bank's argument is implausible in light of
9 BLMIS's Central role in the investment and the fact that
10 they argue in their papers that they were investing as a
11 trustee for various trusts. And notably, they don't say
12 anything in their papers about the intention of the trustee
13 -- of the trust, I should say. It was clearly to invest
14 with BLMIS through Sentry. And under New York Law, as we
15 note in our opposition in Footnote 3, the Trustee of a trust
16 is responsible -- and in fact under New York Law the trustee
17 is the proper party to sue. And beyond that, the
18 subscription agreements, the three subscription agreements
19 also specifically state that if a subscriber is signing as a
20 trustee or agent or nominee or for somebody else, it "agrees
21 that the representations and agreements herein are made by
22 subscriber with respect to itself and the beneficial
23 shareholder."

24 So in any event, the statement that Kookmin Bank
25 placed money into Fairfield Sentry without knowing the true

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1 purpose of the investment is implausible in light of the
2 Second Circuit's opinion in *In re Picard*. And I'll quote it
3 again as I did in the Korea Exchange Bank argument. When
4 these investors chose to buy into feeder funds that placed
5 all or substantially all of their assets with Madoff
6 Securities, they knew where their money was going. And
7 that's 917 F.3d 85, 105 (2d Cir. 2019).

8 So I also want to talk about the declaration
9 itself. Because the declaration that's submitted, it's
10 incomplete and unreliable. And notably, the declaration is
11 not made on personal knowledge of the facts. In fact, it's
12 made on personal knowledge "as informed by review of KB
13 corporate records and discussions with KB personnel." And
14 that's in Paragraph 1 of the declaration.

15 In other words, the declaration appears to be
16 based on Mr. Park's internal investigation as opposed to
17 personal knowledge. And that might be why there are a
18 couple of errors in the declaration. For one, they only
19 attach one of the subscription agreements. And although the
20 form is similar to others, the banking information for one
21 of the declarations that I submit in my declaration shows
22 that at least one subscription agreement uses a New York
23 bank account to both subscribe and redeem shares from
24 Fairfield Sentry. And that's not noted in the declaration.

25 And number two, the October 2004 private placement

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1 memorandum attached to the Park declaration can't be the one
2 that Kookmin Bank actually received when it signed the
3 subscription agreements because that PPM is dated after the
4 time the subscription agreements were signed in April of
5 2004.

6 So I know Mr. Cirillo said that we agreed that
7 this would be the PPM, but I don't necessarily agree that
8 that would be the PPM that they received. Perhaps some of
9 the language might be the same, but the Trustee doesn't know
10 what PPM -- what private placement memorandum that Kookmin
11 Bank actually received, because it had to have been one that
12 came before the one that Mr. Park attaches to his
13 declaration. But regardless, as a mentioned before,
14 regardless of the declaration, even if it's all true, you
15 can't get past the New York bank accounts. All three
16 subscriptions -- all three subscription agreements, at issue
17 listed Deutsche Bank Trust Company, America's Bank Account
18 for the receipt of redemption payments. And Exhibits 4, 5
19 and 6 to my declaration also show that Kookmin Bank used
20 these bank accounts to receive the transfers at issue.
21 Those are examples of the transfers that went into those
22 accounts. And in fact the Trustee is aware of at least 30
23 transfers that went from Fairfield Centuries HSBC account in
24 New York to Kookmin Banks, Deutsche Bank account in New
25 York. And as I mentioned before, one of the subscription

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1 agreements uses the New York bank account to subscribe into
2 Fairfield Century.

3 So the circumstances surrounding Kookmin Bank's
4 use of the New York accounts show why Liche and Case is
5 conferring jurisdiction based on the use of correspondent
6 accounts is applicable here. And also Mr. Cirillo doesn't
7 mention the recent Arcapita case, which Your Honor cited in
8 your Korea Exchange Bank case, which it -- this is not a
9 case involving terrorism or, you know, the unlawfulness that
10 Mr. Cirillo suggests is necessary; rather it was a case in
11 which the designated correspondent account was used to
12 receive fund transfers from the debtor. And although the
13 debtor chose to use US dollars to effectuate the investment,
14 the defendant "could have avoided the United States entirely
15 by routing placements through correspondent accounts
16 anywhere in the world". And that's 640 BR at Page 618.
17 This is Bahrain Islamic Bank v Arcapita Bank 640 BR 604, May
18 22, 2022.

19 And so the same can be said here that Kookmin bank
20 entered into agreements with Fairfield Century in which they
21 used the New York bank accounts. Kookmin Bank chose to
22 enter into these agreements. They didn't have to, but they
23 chose to and they used New York bank accounts for this. And
24 I'll just quote, Your Honor's language in the Korea Exchange
25 Bank case and this is the Westlaw version, which is 2022 WL

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1 4371908 at Page *4, where defendant chooses to use the
2 United States bank accounts to receive funds exercising
3 personal jurisdiction for the defendant for causes of action
4 relating to those transfers is constitutional.

5 So -- and going back to the PPM, the Private
6 Placement Memorandum, even if the October 2004 PPM is the
7 only one that they saw or it seems to be the only one that
8 they have found in their investigation, even though we
9 believe they must have gotten one before that; there's
10 plenty of information in that PPM showing that this is a New
11 York Centric Investment, and it does mention BLMIS and
12 again, it's the same one from the Korea Exchange Bank case.
13 And you know, on Page 15 of the PPM, currently, BLM has
14 approximately 95 percent of the funds assets under custody.

15 On Page 8, it discusses the split strike
16 conversion strategy and the purchase of S&P stocks. Page 1
17 and 10, it talks about the initial investment and initial
18 offering price in US dollars. Page 20, maintains assets in
19 US dollars. Then VNAV is determined in US dollars. There's a
20 mention of US counsel located in New York. There's a
21 mention of trade risks involving US Government activities on
22 Page 16. There's a mention of legal matters having been
23 passed in the United States by counsel in New York. That's
24 at Page 33. So, even if -- even if Kookmin Bank is accurate
25 in saying they had no idea this was Madoff, the October 2004

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1 PPM, and even if that's the one that they had, again, it's
2 questionable, but it's more than sufficient information to
3 show that they understood Fairfield Century to be a New York
4 based investment and the Madoff held almost all of the
5 assets.

6 And finally, the subscription agreements, Your
7 Honor. They have the form selection clause and it's one
8 more contact, again we're not saying that this form
9 selection clause automatically confers jurisdiction, but
10 it's one more contact that shows this was a New York based
11 investment and that Kookmin Bank knowingly invested in a New
12 York based fund. And not only that, but it also shows that
13 it would be fair to confer jurisdiction in this case. They
14 agreed to the form selection clause in their -- in their
15 subscription agreements. And so under the totality of the
16 circumstances, Your Honor, the jurisdiction here, there's
17 plenty of contacts, it's fair and there's not much different
18 here than in any other cases other than a questionable
19 declaration. But even if that declaration is accepted,
20 there's -- there's still jurisdiction here. And unless,
21 Your Honor, has any questions for me, I'll --

22 THE COURT: I do not. Mr. Cirillo, anything you
23 wish to add?

24 MR. CIRILLO: Yes, a few things. The Mr. Fish
25 says we can't get past the New York correspondent accounts.

1 We appear to have a disagreement over whether the law of the
2 State of New York does or doesn't limit the jurisdictional
3 significance of New York bank accounts. The Second Circuit
4 made clear in Liche that New York law applies and that's the
5 Touchstone and the Court of Appeals -- the New York Court of
6 Appeals has never backed off the notion that it has to be an
7 active participant in an illegal transaction. And the reason
8 is otherwise in innocent transactions that occur daily and
9 trillions of dollars would then suddenly be suddenly sucked
10 into New York courts by jurisdiction, which is not
11 appropriate or constitutional. The -- indeed it is such a
12 mindless decision to designate a New York correspondent
13 account that it is advantageous. It is trivial. It is
14 irrelevant.

15 The referent -- the only reference in the PPM, and
16 I'm a little surprised because Mr. Fish and I agreed that
17 whatever, and it's in the brief, that whatever document PPM
18 is referenced in the subscription agreement and assuming
19 that, in fact, that was received, that the contents -- we
20 agreed the contents were no different -- for the purposes of
21 this motion, were no different from the October 2004. And
22 so to argue -- to put -- to cast doubt that there might have
23 been more is excluded on this motion. And the only
24 reference in that to blame us and there was no reference to
25 Madoff, is as a sub custodian of assets. And a custodian is

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1 just like the bank that has safety deposit boxes that people
2 put assets in. It has no active role in how those assets
3 arise and so knowing someone is a sub custodian is of no
4 value in knowing who is executing transactions.

5 As to the probity of the Park declaration, the
6 basis for Ms. Park's knowledge is exactly the same as in a
7 30b6 deposition. People don't know, certainly after 18
8 years, individually, what happened in a corporation like
9 Kookmin Bank. So how do they testify? They learn from
10 records and from people what they can and provide the
11 testimony in that fashion. There's nothing wrong with that
12 and the supposed errors that Mr. Fish said are not errors at
13 all, and they're not inconsistent at all with the
14 declaration.

15 The recitation about the declaration that Mr. Fish
16 gave significantly omits the fact that as a Trustee under
17 Korean law, the -- the only role that the Trustee had was to
18 execute transactions. He doesn't make any reference to the
19 asset manager who did all of the decision making on what to
20 buy, what to sell, when to buy, when to sell. That is
21 crucial and New York law, in fact, does not apply as to
22 whether a beneficial owner or an asset manager can be sued.
23 In fact it is New York law at (indiscernible) includes the
24 choice of law, provisions of law, and in this case they
25 point to Korean law, and therefore to argue that under New

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1 York law, they couldn't have sued the beneficial owners or
2 the asset manager is simply wrong.

3 Other than that, Your Honor, I rest on what I said
4 earlier. I think, Your Honor, gets it and I need to
5 persuade, Your Honor, to take a different course from the
6 course you've taken on these two points in the past. I
7 recognize that that is an uphill battle and I hope that Your
8 Honor, will consider these arguments as good faith based,
9 and based on a solid grounding of controlling law from the
10 United States Supreme Court, Second Circuit and the New York
11 Court of Appeals. That's all I have, thanks.

12 THE COURT: Very good. Mr. Fish, any quick
13 answer?

14 MR. FISH: Sure. Just a couple of minor points
15 because I don't want Mr. Cirillo to be upset with me about
16 the Private Placement Memorandum issue. As I said during
17 the argument, we don't know what PPM Kookmin Bank received,
18 but you know, I told Mr. Cirillo, that we can assume for the
19 sake of the argument that they received this October 2004
20 PPM and that if they received an earlier one, perhaps the
21 language may have been similar. But again, we don't know
22 what they received and I think that's the point. But
23 regardless of which one they received; I think the 2004
24 version that they submit in their papers is sufficient.
25 Also there -- Your Honor, there's no argument in the papers

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1 regarding the use of Korean Law. You know, I think that's a
2 red herring. I think that's -- that maybe, perhaps that's
3 an issue more appropriate for discovery and Kookmin Bank's
4 role in the investment is obviously a fact question and we
5 can explore that during discovery as well. And that's all I
6 have to say, Your Honor.

7 THE COURT: Very good. You will obviously receive
8 a written opinion.

9 MR. CIRILLO: Thank you.

10 MR. FISH: Thank you, Your Honor.

11 MR. CIRILLO: Appreciate it, Your Honor.

12 THE COURT: Thank you. Chambers.

13 (Whereupon these proceedings were concluded at
14 11:53 AM)

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

5

6

Sonya M. Ledanski Hyde

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8 Sonya Ledanski Hyde

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25 Date: October 21, 2022

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